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No. 90-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

C.L. GRIMES,

Petitioner,

v.

CENTERIOR ENERGY CORPORATION,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

THADDEUS HOLT
(Counsel of Record)
910 16th Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 223-9010
Attorney for Petitioner

December 28, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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The question posed by the petition is the correctness of the "any subsequent action" rule adopted by the court below—the principle that management may exclude from proxy materials a proposed reform in corporate governance, however significant, if there are *any* circumstances, however unlikely, under which an ordinary business action might be taken under the proposed new governance.

Since respondent's brief (cited herein as "Resp. Br.") never addresses this question, there is little to say in reply.

We do note respondent's assertion that what is here involved is an "SEC[ ] determination," Resp. Br. at 4; its assertion that in this case "the SEC found"

certain matters, *id.* at 9[1]; its references to "SEC precedent", *id.* at 6; its statements that in other instances "the SEC found" or "the SEC allows" various items, *id.* at 8-9; and its reference to "SEC decisions," *id.* at 10. These formulations are highly misleading. Neither the administrative event in this case, nor any of the Lexis references which respondent's brief cites as if they were SEC actions, was in fact an action by the SEC. All were simply "no-action letters" advising that the SEC's employees would not recommend to the Commission that it institute enforcement proceedings under defined circumstances. The weight to which such staff letters are entitled is so modest that they have been held not to constitute reviewable agency action. *Kixmiller* v. *SEC*, 492 F.2d 641 (D.C. Cir. 1974).[2] As we pointed out in our Petition, the absence of SEC action in this field reflects the SEC's deliberate policy of circumventing direct judicial review, and this policy confers on the decision below an unusual "leverage" that makes peculiarly appropriate this Court's exercise of its supervisory authority.

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[1] Respondent's assertions that the SEC staff "found" certain matters in this case should be contrasted with the highly tentative actual text of the no-action letter here involved, Pet. App. at 15a-16a.

[2] *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), cited at Resp. Br. 6, dealt with a radically different situation in which Congress had by express statutory language rendered "conformity with any interpretation or approval by an *official or employee* of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals" a defense against liability under the statute in question. 444 U.S. at 567 (emphasis added).

And in any event, none of the no-action letters cited by respondent deals with the "any subsequent action" test—which is the issue here.

We note also respondent's suggestion (Resp. Br. at 9-10) that the petition should be denied because respondent has advanced two grounds, in addition to those relied on by the court below, as to which it has contended that it should prevail. Neither of these asserted grounds was considered by the court below (as respondent recognizes, Resp. Br. at 9); furthermore, one of them had been rejected by the district court. Accordingly, even if there had been any merit in either of these asserted grounds (in petitioner's view there clearly was none), neither of them has any bearing on the grant of certiorari. Perhaps respondent's argument is a confusion of the familiar principle that this Court has no jurisdiction to disturb a judgment that rests on an adequate and independent state ground.

Respectfully submitted,

THADDEUS HOLT
(Counsel of Record)
910 16th Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 223-9010

Attorney for Petitioner

December 28, 1990